

YALKUT & ISRAEL, ESQS.
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Arlen S. Yalkut, Esq. (AY 1522)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID LION,

Case Number: 07 CV 3129 (SCR)

Plaintiff,

v.

AFFIRMATION IN OPPOSITION
TO MOTION TO DISMISS
COMPLAINT

VCU HEALTH SYSTEM, MCU HOSPITALS
& PHYSICIANS d/b/a VCU MEDICAL
CENTER, et al.,

Defendants.

ARLEN S. YALKUT, pursuant to 28 U.S.C. Section 1746, declares as follows:

1. I am a partner in the firm of Yalkut & Israel, Esqs., Counsel for the Plaintiff David Lion in the above-captioned matter. I respectfully submit this Declaration of my own personal knowledge in opposition to the Defendants' motion to dismiss the Complaint against the Defendants.

2. This case involved allegations of negligence and medical malpractice allegedly committed by the Defendants, jointly and individually, on or about May 5, 2005 while the Plaintiff, DAVID LION, was a patient at VCU HEALTH SYSTEM, MCU HOSPITALS & PHYSICIANS d/b/a VCU MEDICAL CENTER.

3. While at the VCU MEDICAL CENTER, the Plaintiff, DAVID LION, was attended by numerous doctors and physicians including the Defendants JOHN M. KELLUM, M.D., AARON SCOTT, M.D., MARK C. WILLIS, M.D., CHRISTOPHER J. HOGAN, M.D. (Sued herein as JOHN C. HOGAN), MICHEL ABOUTANOS, M.D., ANDREA POZEZ, M.D. as well as possibly NORMAN BOARDMAN, M.D. and ELLIOTT GANYON, M.D.

4. My review of the Declarations submitted by the Defendants as Exhibits C, D, E, F, G, H, I and J, indicate that Drs. Kellum, Willis, Boardman, Hogan, Aboutanos and Pozez are doctors licensed in Virginia who have been “granted privileges” at VCU MEDICAL CENTER, and who are not employees of the Defendant VCU MEDICAL CENTER.

5. Each of the Defendants in this matter were served with the Summons and Complaint by a Deputy Sheriff from Richmond Virginia in accordance with both Virginia State Law and the Federal Rules. (see annexed the Affidavits of Service annexed hereto as Exhibit 1).

6. This action was commenced within the two (2) year Statute of Limitations applicable to medical malpractice cases in the State of Virginia.

7. The Plaintiff, at all times applicable, was and still is a resident of the State of New York.

8. Based upon the Declarations of each of the Defendants as well as fact that the Plaintiff is a citizen and resident of the State of New York there exists complete Diversity of Citizenship as between the Defendants and the

Plaintiffs herein.

9. When the Plaintiff DAVID LION retained as counsel he set forth the history as set forth in the annexed affidavit. (See annexed the Affidavit of David Lion.) Based upon the stated facts, as well as my offices direct telephone inquiry to the VCU Health System we were advised that as of several years ago that the VCU Health System, MCU Hospitals & Physicians was an an entity separate and apart from the Commonwealth of Virginia and not a public hospital. This inquiry was made specifically because Mr. Lion did not come to us until over eighteen months after the occurrence.

10. The Defendant VCU MEDICAL CENTER, was sued under the name VCU HEALTH SYSTEM, MCU HOSPITALS & PHYSICIANS because of the Defendant VCU MEDICAL CENTER's hospital records refer to itself by the latter name. (See the Discharge Report appended to David Lion's Affidavit).

11. Defendants' Counsel now assert that the Defendant VCU MEDICAL CENTER is not subject to this lawsuit because this Court lacks subject matter jurisdiction over that Defendant because of the Eleventh Amendment of the United States Constitution and because Mr. Lion failed to comply with the strict notice requirements of Section 8.01-195.6 of the Virginia Tort Claims Act which requires that a notice of claim be served within one (1) year after the occurrence which gave rise to the Claim. Admittedly, David Lion did not serve the required notice of claim and the Plaintiff concedes that on that basis his Claim against the Defendant VCU MEDICAL

CENTER is subject to dismissal pursuant to Fed. R. Civ. P. 12 (b) (1).

12. As set forth in the Defendants' Exhibits C, D, E, F, G, H, I and J, the Defendants KELLUM, WILLIS, BOARDMAN, ABOUTANOS and POZEZ are all licensed physicians in the Commonwealth of Virginia who, while having privileges at Defendant VCU MEDICAL CENTER maintain their own independent practices and are independent contractors subject to suit for their own acts.. There is no claim by these Defendants that they are not subject to a lawsuit because of a lack of a notice of claim.

13. Defendants AARON SCOTT and ELLIOTT GAGNON appear to be resident physicians and as such employees of the Defendant VCU MEDICAL CENTER at the time of the occurrences involved in this case. As such the Plaintiff concedes that they are immune from this lawsuit and that dismissal as to them is proper.

13. The applicable Statute of Limitations for the commencement of a medical malpractice action in the Commonwealth of Virginia is two (2) years. Va. Code 8.01-243. This action based on diversity of citizenship was commenced by for the filing of the Summons and Complaint well within the two year period of repose. Service upon the Defendants was made by a Deputy Sheriff in Virginia.

14. Clearly, if this action had been commenced in the Eastern District of Virginia then the Defendants KELLEEM, WILLIS, BOARDMAN, ABOUTANOS and POZEZ could not properly raise an issue of *in personam* jurisdiction.

15. At the time of the commencement of this action, it was believed that the Defendants would be subject to the New York long arm statute

CPLR Section 302 (3) (I) and (ii).

16. The website maintained by the Defendant VCU MEDICAL CENTER indicated that its purpose “ to serve the people of the Commonwealth and the nation.” VCU is represented as a member of Oak Ridge Associated Universities (ORAU), which is a consortium of 87 Colleges and universities and a “contractor For the U.S. Department of Energy (DOE)” located in Oak Ridge, Tennessee. While the published financial data concerning the Defendant VCU MEDICAL CENTER are not fully itemized assets are listed as of July 1, 2000 at \$554,010,554.00. This sum is certainly suggestive that its income derives from sources than that derived from performing its services solely for the benefit of the people of central Virginia.

17. However, it is now conceded that the Defendant VCU MEDICAL CENTER is immune from this lawsuit for reasons already addressed in paragraph 11 above, the Plaintiff DAVID LION should not be deprived on his day in court against Defendants KELLUM, WILLIS BOARDMAN, ABOUTANOS and POZEZ, who are not immune from the prosecution of a medical malpractice case.

18. It is respectfully urged that this Court, rather than dismiss this action as against these remaining Defendants, transfer this case to the appropriate Federal Court which in this case is the Eastern District of Virginia. This is appropriate because none of the remaining Defendants are prejudiced by such a transfer. On the other hand, the Plaintiff, if this case were dismissed would be faced with the situation that the two year Statute of

Limitations might be deemed to have run. In that event, the Plaintiff's meritorious lawsuit would be forfeited even though this action was commenced in a timely fashion and in good faith.

19. Additionally, the Complaint taken as a whole sets forth a valid cause of action in medical malpractice on a *prima facie* basis. Every element of such malpractice is set forth. Counsel for the Defendants raises an argument which is really addressed to style rather than content. Paragraphs 1 through 28 taken as a whole set forth a cause of action in medical malpractice. Each of the three elements referred to at page 17 of the Defendant's Memorandum of Law are set forth. The Complaint contains only one prayer for relief and only one cause of action is stated..

20. Even if the Defendant's Point IV (A) were deemed meritorious, the "Second Count" of the Complaint which incorporates the "First Count" and thereafter clearly supplies the third element, i.e. the injury caused by the breach. Therefore, it is inappropriate to dismiss the Complaint on that ground.

21. For all of the foregoing reasons, as well as the arguments set forth in the accompanying memorandum, the Defendants' Motion seeking to dismiss the Complaint should be denied as against the Defendants Kellum, Willis, Boardman, Aboutanos and Pozez and the matter transferred to the appropriate district, the Eastern District of Virginia in the interest of justice for further proceedings, pursuant to 28 U.S.C. 1631.

WHEREFORE, the Defendants' motion seeking to dismiss the action should be denied as against the Defendants Kellum, Willis, Boardman,

Aboutanos and Pozez and the matter transferred to the appropriate District, the Eastern District of Virginia, in the interest of justice, for further proceedings.

Affirmed July 27, 2007



ARLEN S. YAKUT (AY1522)

EXHIBIT 1

Richmond City Sheriff's Office
LL-1, John Marshall Courts Building
Richmond, Virginia 23219



Civil Process Section
400 N. 9th Street
Telephone (804) 646-6600

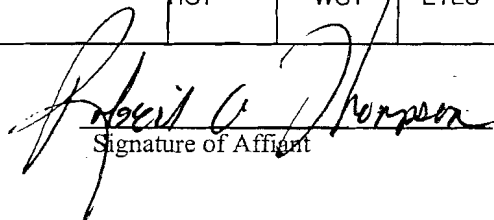
SHERIFF'S OFFICE

AFFIDAVIT OF SERVICE

Being duly sworn and authorized to make service as provided by the Code of the Commonwealth of Virginia, by my signature subscribed below I do hereby certify that I executed a true copy of the within Summons And Complain, in the following manner and on the date so indicated:

- ☒ Served in person
- ☐ Registered agent
- ☐ Served on the person or officer found to be in charge
- ☐ Posted service (only if authorized)
- ☐ Member of Family (Resident)
- ☐ Not found (Explain):

DESCRIPTION OF PERSON SERVED				
NAME John M. Kellum M.D	RACE	SEX	DOB (OR APPX. AGE)	SSN
STREET ADDRESS 1250 E. Marshall St	HGT	WGT	EYES	HAIR


Signature of Affiant

5/21/07

Date

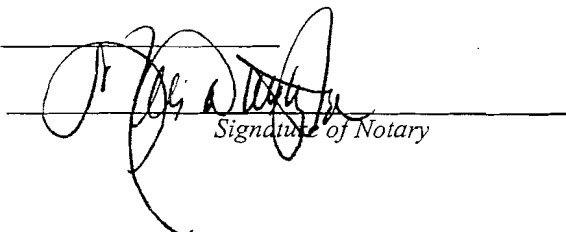
AFFIDAVIT

COMMONWEALTH OF VIRGINIA

Before me personally appeared the said DEP, . R. THOMPSON who says that he/she executed the above instrument in the above manner and on the date indicated.

Sworn to and subscribed in my presence this 21st day of MAY, 2007

My commission expires JUNE 30, 2010


Signature of Notary

Richmond City Sheriff's Office
LL-1, John Marshall Courts Building
Richmond, Virginia 23219



Civil Process Section
400 N. 9th Street
Telephone (804) 646-6600

SHERIFF'S OFFICE

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- (X) Served in person
- () Registered agent
- () Served on the person or officer found to be in charge
- () Posted service (only if authorized)
- () Member of Family (Resident)
- () Not found (Explain):

DESCRIPTION OF PERSON SERVED				
NAME Aaron Scott M.D.	RACE	SEX	DOB (OR APPX. AGE)	SSN
STREET ADDRESS 1250 East Marshall St.	HGT	WGT	EYES	HAIR

Robert A. Thompson
Signature of Affiant

5/21/07
Date

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

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[Signature]
Signature of Notary

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- ☐ Posted service (only if authorized)
- ☐ Member of Family (Resident)
- ☐ Not found (Explain):

DESCRIPTION OF PERSON SERVED				
NAME Mark Willis M.D.	RACE	SEX	DOB (OR APPX. AGE)	SSN
STREET ADDRESS 1250 E Marshall St	HGT	WGT	EYES	HAIR

Robert A. Thompson
Signature of Affiant

5/31/.07
Date

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

Before me personally appeared the said DEP. R. THOMPSON who says that he/she executed the above instrument in the above manner and on the date indicated.

Sworn to and subscribed in my presence this 21st day of MAY, 20 07
My commission expires june 30, 2010

[Signature]
Signature of Notary

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Richmond, Virginia 23219



Civil Process Section
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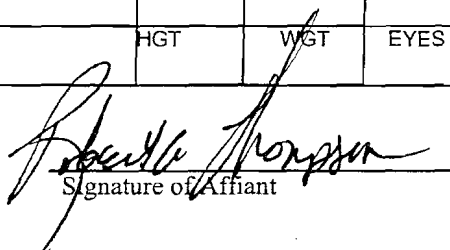
SHERIFF'S OFFICE

AFFIDAVIT OF SERVICE

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- (☒) Served in person
- () Registered agent
- () Served on the person or officer found to be in charge
- () Posted service (only if authorized)
- () Member of Family (Resident)
- () Not found (Explain):

DESCRIPTION OF PERSON SERVED				
NAME Norman Bordman M.D.	RACE	SEX	DOB (OR APPX. AGE)	SSN
STREET ADDRESS 1250 E. M Arshall St	HGT	WGT	EYES	HAIR


Signature of Affiant

5/21/07

Date

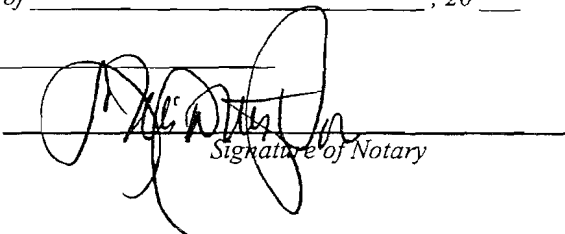
AFFIDAVIT

COMMONWEALTH OF VIRGINIA

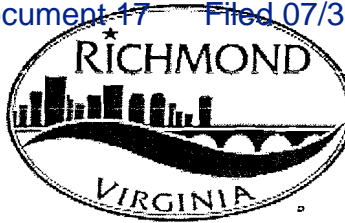
Before me personally appeared the said DEP. R. THOMPSON who says that he/she executed the above instrument in the above manner and on the date indicated.

Sworn to and subscribed in my presence this 21st day of MAY, 20 07

My commission expires JUNE 30, 2010


Signature of Notary

Richmond City Sheriff's Office
LL-1, John Marshall Courts Building
Richmond, Virginia 23219



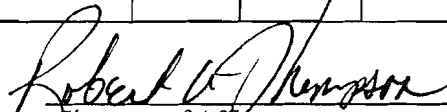
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400 N. 9th Street
Telephone (804) 646-6600

SHERIFF'S OFFICE
AFFIDAVIT OF SERVICE

Being duly sworn and authorized to make service as provided by the Code of the Commonwealth of Virginia, by my signature subscribed below I do hereby certify that I executed a true copy of the within Summons And Complain, in the following manner and on the date so indicated:

- ☒ Served in person
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- ☐ Served on the person or officer found to be in charge
- ☐ Posted service (only if authorized)
- ☐ Member of Family (Resident)
- ☐ Not found (Explain):

DESCRIPTION OF PERSON SERVED				
NAME Elliott Ganyon M.D.	RACE	SEX	DOB (OR APPX. AGE)	SSN
STREET ADDRESS 1250 E Marshall St	HGT	WGT	EYES	HAIR


Signature of Affiant

5/21/07

Date

AFFIDAVIT


COMMONWEALTH OF VIRGINIA

DEP. R. THOMPSON

Before me personally appeared the said _____ who says
that he/she executed the above instrument in the above manner and on the date indicated.

Sworn to and subscribed in my presence this 21st day of MAY, 20 07

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Signature of Notary

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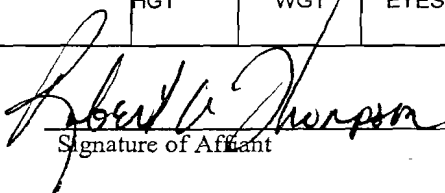
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- () Served on the person or officer found to be in charge
- () Posted service (only if authorized)
- () Member of Family (Resident)
- () Not found (Explain):

DESCRIPTION OF PERSON SERVED				
NAME Andrea Pozez M.D.	RACE	SEX	DOB (OR APPX. AGE)	SSN
STREET ADDRESS 1250 E Marshall St	HGT	WGT	EYES	HAIR


Signature of Affiant

5/21/07

Date

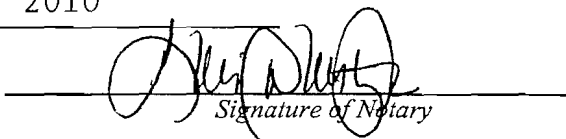
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My commission expires JUNE 30, 2010


Signature of Notary

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Richmond, Virginia 23219



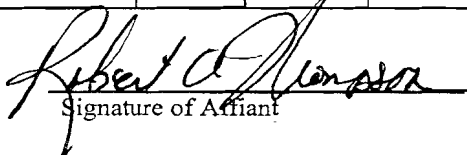
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- () Served on the person or officer found to be in charge
- () Posted service (only if authorized)
- () Member of Family (Resident)
- () Not found (Explain):

DESCRIPTION OF PERSON SERVED				
NAME John C. Hogan M.D.	RACE	SEX	DOB (OR APPX. AGE)	SSN
STREET ADDRESS 1250 E. Marshall St.	HGT	WGT	EYES	HAIR


Signature of Affiant

5/21/07
Date

AFFIDAVIT

COMMONWEALTH OF VIRGINIA

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that he/she executed the above instrument in the above manner and on the date indicated.

Sworn to and subscribed in my presence this 21st day of MAY, 20⁰⁷

My commission expires JUNE 30, 2010


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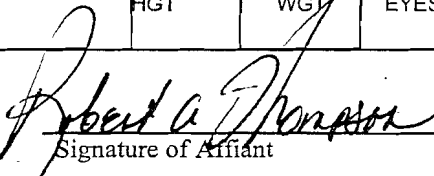
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- () Posted service (only if authorized)
- () Member of Family (Resident)
- () Not found (Explain):

DESCRIPTION OF PERSON SERVED				
NAME Michael Aboutanos M.D.	RACE	SEX	DOB (OR APPX. AGE)	SSN
STREET ADDRESS 1250 E Marshall St	HGT	WGT	EYES	HAIR


Signature of Affiant

5/21/07

Date

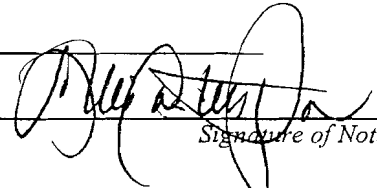
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- (X) Served in person Althea White - previous - Admin Asst.
- () Registered agent
- () Served on the person or officer found to be in charge
- () Posted service (only if authorized)
- () Member of Family (Resident)
- () Not found (Explain):

DESCRIPTION OF PERSON SERVED				
NAME Vcu Health Center, Mcv Hospital & Physicians At Vc Medical Center	RACE	SEX	DOB (OR APPX. AGE)	SSN
STREET ADDRESS 1250 E. Marshall St.	HGT	WGT	EYES	HAIR

Robert A. Thompson
Signature of Affiant

5/21/07

Date

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Telephone: (718) 292-2952
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Arlen S. Yalkut, Esq. (AY 1522)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID LION,

Case Number: 07 CV 3129 (SCR)

Plaintiff,

v.

AFFIDAVIT IN OPPOSITION
TO MOTION TO DISMISS
COMPLAINT

VCU HEALTH SYSTEM, MCU HOSPITALS
& PHYSICIANS d/b/a VCU MEDICAL
CENTER, et al.,

Defendants.

STATE OF NEW YORK)

ss:

COUNTY OF BRONX)

DAVID LION, being duly sworn, deposes and says:

1. I am the plaintiff in the above-captioned matter and am fully familiar with the facts therein. I am making this affidavit in opposition to the Defendants' motion seeking to dismiss the Complaint on various grounds.

2. On May 1, 2005, I was involved in a serious accident which occurred on a closed course during a motorcycle race in which I was a participant.

The accident took place at approximately 9:30 a.m.

3. As a result of the accident I sustained serious physical injuries which included significant chest trauma, predominantly to the right hemothorax with fractures of the 8th, 9th and 10th ribs, transverse comminuted talar neck fracture with medial subtalar dislocation with soft tissue swelling, irregularity of pelvis suggestive of a nondisplaced fracture, left knee demonstrated a vertically oriented and nondisplaced patellar fracture with knee joint effusion, comminuted fracture of right fifth middle phalanx, avulsion fracture of the third and fourth digit of right hand, left patellar fracture, left pneumothorax, left ankle fracture and right and left forearm abrasions. These were the findings made by the Defendants while I was a patient at the VCU Health System, MCV Hospitals & Physicians facility in Richmond Virginia. (See annexed hereto the Discharge Report from that facility.) My discharge from the facility occurred on May 6, 2005.

4. I was removed from the accident scene by helicopter and taken to the VCU facility. At the hospital I was brought into the Emergency Room and given morphine for the extreme pain. Because of lung puncture the doctors informed me that they needed to insert a tube into my right side under my armpit. Then I was taken for X-rays and a CAT scan.

5. I was informed that I had a severe left ankle fracture and needed surgery or I would never work again. (I was a truck driver for the New York Times.) I was told by a doctor (surgeon) that I had to sign a paper because they had to do surgery. The doctor told me that the paper gave them permission to do surgery. The document was not read to me nor was I able to read the paper because of the morphine they had previously

administered. I could not read with my right hand which was broken and tried to write with my left hand (which I later learned was also broken but never treated by the Defendants during my hospital stay there.) I was not advised as to any risks associated with the surgery to be performed.

6. I was removed to the operating room and was given an epidural injection between the 13th and 14th vertebrae. I woke up a day or two later. I woke up in a semi-private room and received visitors. Then a doctor came into the room and I informed him that I believed that my left hand was broken as well. The doctor told me: "Don't worry, we know about it. We'll take care of it later." Despite this promise, the Defendants performed no surgery whatsoever on my left hand.

7. In the operating room the first day surgery was performed on my left ankle and the right hand. To my knowledge, no additional surgical procedures were performed by the Defendants.

8. My sisters arrived at the hospital from New York. They requested to speak to a doctor and it took over 36 hours for any doctor to speak to them. The head nurse was annoyed that no doctor came to see me or speak to my relatives who came down to see me.

9. Because of lack of attention, arrangements were made to transfer me back to New York to the Cornell Hospital Campus. Despite the notations on the Discharge Information sheet (Page 3), None of the Defendant Doctors told me that I required additional surgery to my chest. They did mention

that I might have a crack in my left knee. (At Cornell Hospital in New York, I was advised that no such surgery was necessary.)

10. At Cornell University Hospital, Dr. Lorch told me that there was no need for surgery on my knee. Dr. Lorch informed me that he had to perform surgery on my left ankle because the surgery in Virginia was not performed properly. He stated that the procedure in Virginia had put a rod in the bottom of my heel which should not have been done. The the reason was that the rod fused the heel to the ankle and as a result the area was being deprived of necessary blood flow. Without the additional surgical procedure the left foot likely have to be amputated.

11. Additionally, I was informed at New York Presbyterian Hospital (part of the Cornell University Hospital) by Dr. Deluski (sic) that the right pinky finger had to be operated on because the previous surgery in Virginia was inadequate. In addition, Dr. Deluski performed surgery on my left hand and Put a Pin and rod to correct the condition. The Defendants in Virginia failed to perform this procedure at all. These surgeries lasted over Twelve hours.

12. The surgery on my foot in Virginia left "air pockets" in the wound which led to infections which required reopening of the wound and cleansing of the wound. As a result I was unable to place any weight on my left foot for an additional ninety days.

13. I initially consulted with some attorneys in Virginia and was informed that I had a "good case" but that their firms had relationships with the VCU Hospital which would make it difficult or impossible to bring a lawsuit against

the VCU Health System, MCV Hospital & Physicians. None of the attorneys advised me that VCU Health System was a Virginia State entity that required that I file a Notice of Claim. I was advised that I had two (2) years to start a lawsuit and that the hospital in Virginia was a private institution.

14. I eventually sought legal counsel while in New York about eighteen (18) months after the accident and my hospital stay in Virginia. I informed them of the circumstances described above. I supplied my present attorneys with the hospital records from both Virginia as well as from New York.

15. I commenced this action against the Defendants in good faith. The Defendants led me to believe that everything that needed to be done in terms of operative procedures had already been performed in Virginia. Only after I arrived in New York I obtained the VCU Hospital Records through New York Presbyterian Hospital. Only then did I learn that the Defendants in effect abandoned me in my time of need while knowing full well that I would require additional surgical procedures.

16. I am now advised that VCU Health System is apparently a State of Virginia entity. I am also advised that most of the Defendant doctors are not state employees and may be liable for their own actions and inactions.

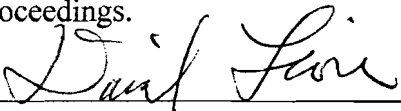
17. This action was commenced within the two (2) year Statute of Limitations which applies to medical malpractice actions in Virginia. All of the Defendants were served in person in Virginia and are presently represented

by counsel.

18. I request that this Court transfer this case, in the interest of justice, to the United States Federal Court for the Eastern District of Virginia. I further request that since that since there are courthouses in Alexandria, Newport News, Norfolk and Richmond that the case be heard in any of the cities other than Richmond because of the apparent influence the VCU Health System has in that region. Because of the two year Statute of Limitations if this present were dismissed rather than transferred to the correct District it might be deemed time barred even though the case is clearly meritorious as against the majority of the Defendants.

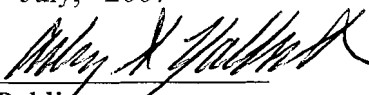
19. For all of the foregoing reasons, it is respectfully requested that the Defendants' motion to dismiss be denied and that the case be transferred to the Eastern District of Virginia for further proceedings.

WHEREFORE, it is respectfully requested that the Defendants' motion be denied and that this case be transferred to the United States District Court for the Eastern District of Virginia for further proceedings.

x 

DAVID LION

Sworn to before me this
25th day of July, 2007



Notary Public
Qualified at Rockland County
02YA9762570
Commission Expires 9/30/2010

**VCU Health System, MCV Hospitals & Physicians
Richmond, VA 23298**

CPROD - Production

Discharge Information Form

TRAUMA, MA5613 - 1268496

Result Type: Discharge Information Form
Received Date: Friday, May 06, 2005 11:42
Result Status: Auth (Verified)
Performed By: Elliott RN, Randy on Friday, May 06, 2005 11:43
Verified By: Elliott RN, Randy on Friday, May 06, 2005 11:43
Encounter info: 706800125618, VCUHS, IP, 5/1/2005 -

Discharge Information for Referring Providers

Admission Date: 05/01/05 16:52

Discharge on: 05/06/05 8:57:00, **Disposition:** Other Facility/Nursing Home, Contact MD prior to releasing patient, **Start:** 05/06/05 8

Principle Dx-Condition determined to be primary problem making admission necessary: motorcycle collision

Dxs- Problems requiring treatment and/or contributing to LOS:

Discharge Medications:

Provider Information for Referring:

Referring Provider: SELF MD, REFERRED

Discharging Attending Physician: ED MD, ATTENDING

Primary Care Provider: SELF MD, REFERRED

Discharging Provider: Yes

Dictating Provider: ZICKLER NP, GAYLE T

Discharging Service: IP-Trauma Surgery

Consulting Services were provided by:

To reach Providers from outside the VCU Health System, call Telepage 804-828-0951 and have them paged or call 1-800-762-6161.

VCU Health System's website: www.vcuhealth.org

Attention VCUHS personnel

Information above is for Referring Providers and not intended to be given to patients. File in patient's chart. Information below is for the patient.

Printed by: Elliott RN, Randy
Printed on: 5/6/2005 11:43

Page 1 of 5
(Continued)

**VCU Health System, MCV Hospitals & Physicians
Richmond, VA 23298**

CPROD - Production

Discharge Information Form

TRAUMA, MA5613 - 1268496

Discharge Information for Patient

VCU Health System would like to thank you for allowing us to assist you with your healthcare needs.

Visit our website at: www.vcuhealth.org.

If you have any new symptoms, changes in your condition, or questions, please contact your Primary Care Provider. If you need to reach a Health Care Provider in the hospital, call (804)828-0951 and ask the operator to page the *Provider on call* for IP-Trauma Surgery

The following information will help you care for yourself after leaving the hospital.

You were admitted to the hospital on 05/01/05 16:52

Discharge on: 05/06/05 8:57:00, Disposition

You were hospitalized for the following condition(s):

Patient involved in motorcycle collision on May 1, 2005. Injuries include right rib fractures 8-10, right hemothorax, right pneumothorax, left pneumothorax, left patella fracture, left ankle fracture, right 5th digit phalanx, avulsion fracture of tuft of 3rd/4th digits, and right forearm/left hand abrasions.

The following procedures were performed:

Open reduction of internal fixation of 4th and 5th digits of right hand May 1, 2005. Open reduction internal fixation of left ankle/foot May 1, 2005 Right chest tube placement May 1, 2005

Allergies:

NKA

Reactions:

Medication Instructions:

If you were taking any medicine before coming to the hospital, please check with the doctor who prescribed it to see if you should keep taking it.

Percocet contains acetaminophen. Avoid taking other medications which contain acetaminophen (such as Tylenol) while taking Percocet. Excess doses can cause liver damage.

Restrictions:

No smoking.

Driving: You may drive once you are no longer taking narcotics.

Exercise: No strenuous exercises.

Extremities: Do not put any weight on left leg/foot.

Lifting Weight: No heavy lifting.

Printed by: Elliott RN, Randy
Printed on: 5/6/2005 11:43

Page 2 of 5
(Continued)

VCU Health System, MCV Hospitals & Physicians
Richmond, VA 23298

CPROD - Production

Discharge Information Form

TRAUMA, MA5613 - 1268496

Provider Instructions:

Additional Information - MD/NP/PA:

Patient being discharged to New York (Cornell Hospital Campus). Patient needs to follow-up immediately with trauma surgery upon arrival to Cornell. Patient has right chest tube and needs further evaluation by cardiothoracic surgery for chest reconstruction/hemothorax/ribs 2-9 fractures. The need for chest reconstruction was discussed with patient. Patient may require further chest surgery. Patient is non weight bearing on left lower extremities and needs to follow-up with orthopedic surgery in 1 week for evaluation of left patella/ankle. Patient may resume usual diet and activities as tolerated.

Diet and Nutrition Instructions:

Resume your previous diet.

This information was given by Nutritional Services and Nursing
This information was given to:

Follow-up Appointments:

If you are in a managed care plan, contact your Primary Care Provider to get referrals for follow-up care.

Nursing and Provider Instructions:

Call 911: DO NOT DRIVE yourself to the ER; For sudden onset of shortness of breath

Call the doctor if you have: Change in wound drainage (increased amount, foul odor, color); Headache, unrelieved by Tylenol; Pain, swelling or tenderness in the calf of either leg; Shortness of breath, fluttering feeling in chest

A temperature over 101.5 degrees fahrenheit

Bleeding from anywhere

Pain, heat, redness, discharge or swelling at anywhere

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID LION,

Case Number: 07 CV 3129 (SCR)

Plaintiff,

v.

VCU HEALTH SYSTEM, MCU HOSPITALS
& PHYSICIANS d/b/a VCU MEDICAL
CENTER, et al.,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

YALKUT & ISRAEL, ESQS.
865-B Walton Avenue
Bronx, New York 10451
Telephone: (718) 292-2952
Facsimile: (718) 993-1542
Arlen S. Yalkut, Esq. (AY1522)

Attorneys for Plaintiff *David Lion*

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TABLE OF AUTHORITIES

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The Plaintiff David Lion submits this memorandum of law in opposition to the Defendants' motion to dismiss the complaint and to request that this Court transfer this case to the appropriate District Court, the Eastern District of Virginia, pursuant to 28 U.S.C. 1631.

INTRODUCTION

On April 19, 2007, the Plaintiff David Lion ("Lion") filed this lawsuit against VCU Health System ("VCU") and the Defendant Doctors ("Doctors"). The Complaint set forth a cause of action against each and the Defendants for medical malpractice based upon the medical care and treatment of Lion by Defendants at the VCU facility in Richmond, Virginia. It is now conceded by all parties that the Defendants are citizens or otherwise domiciled in the Commonwealth of Virginia. It is not challenged by any of the Defendants that the Plaintiff Lion is a Citizen of the State of New York. It is thus clear that complete diversity of the parties is unequivocally established.

The Federal District Courts have jurisdiction of the controversy between the parties based upon diversity of citizenship and jurisdictional amount. *28 U.S.C. 1332(a)*. The question of which district the matter should have been commenced was a matter of dispute. However, based upon the present understanding the Plaintiff Lion contends that the action should be transferred to the Eastern District of Virginia. This is true because although this action was filed within the applicable Statute of Limitations for medical malpractice in Virginia, a outright dismissal of this action might be deemed to bar the Plaintiff from proceeding

in a new action against those Defendants who are not immune from liability.

This writer has conferred with counsel for the Defendants and the Plaintiff has furnished to Defendants' counsel Rule 26a information including records of the treatment of the Plaintiff Lion at the hospital in New York. The Defendants who are not immune are, the Plaintiff contends, in no way prejudiced by the transfer of this action to the appropriate District Court under the provisions of 28 U.S.C. 1631.

STATEMENT OF FACTS

The Plaintiff Lion came under the care of the Defendants on May 1, 2005 and remained under their care until he was discharged on May 6, 2005. While under the care and treatment of the Defendants VCU and Doctors, the Plaintiff Lion underwent two surgical procedures for injuries he sustained on May 1, 2005. The Complaint sets forth various allegations concerning the failure of the Defendants VCU and Doctors to perform procedures, failure to diagnose, failure to adequately interpret the plaintiff's symptoms and failure to properly interpret radiological reports and generally failure to attend to the Plaintiff with requisite regularity.

Subsequent to the commencement of this action, the Plaintiff learned that several of the Defendant Doctors are not employees of VCU, but rather are licensed physicians with privileges to practice at the VCU facility and other locations. These Defendant Doctors including the Defendants Kellum, Willis, Aboutanos, Pozez and Boardman. Each of these doctors, it is contended are independent contractors and do not enjoy the immunity afforded the

Defendant VCU and its employees.

The Plaintiff, upon review of the applicable law now concedes that the Defendant VCU is immune from this lawsuit because of the Plaintiff's failure to file a notice of claim within one year after the occurrences which gave rise to this case. Defendant Doctors Scott and Gagnon based upon their declarations as well as a review of the Defendant VCU's website (as to Dr. Scott) appear to be employees of the Defendant VCU at the time of the occurrences and are entitled to the immunity from suit enjoyed by Defendant VCU. Therefore, I will not further address the issues set forth to Defendants' Argument Point Heading I (A) and (B).

Although it was originally believed that the Defendants were subject to personal jurisdiction in New York pursuant to Section 302(a)(3) of the Civil Practice Law and Rules, the Plaintiff is willing to concede this belief to be in error. The Plaintiff contends that he has stated a valid cause of action in the Complaint and that the case should, in the interest of justice, be transferred to the appropriate District Court, the Eastern District of Virginia.

ARGUMENT

I. THE ACTION FOR MEDICAL MALPRACTICE WAS COMMENCED IN FEDERAL DISTRICT COURT WITHIN THE APPLICABLE STATUTE OF LIMITATIONS.

Section 8.01-243 (A) of the Virginia Code provides that:

“Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.”

In this case, the plaintiff LION was under the care and treatment of the Defendants from May 1, 2005 through May 6, 2005. This fact is undisputed. It is also undisputed that action was commenced by filing the Summons and Complaint on April 19, 2007, within the applicable two year period applicable to the commencement of medical malpractice actions under Commonwealth of Virginia law.

Based upon the uncontested fact that the Defendants are all Virginia citizens or entities with no New York State contacts and the fact that the Plaintiff Lion is a citizen of New York, it is clear that diversity jurisdiction for this action exists pursuant to the provisions of 28 U.S.C. 1332 (a).

All of the Defendants have been served by a Deputy Sheriff in the Commonwealth of Virginia and have appeared at least for the purpose of this motion by Counsel in both Virginia and New York.

Additionally, the Defendants' Virginia counsel requested discovery regarding the New York hospital medical records during the pendency of this motion. Plaintiff's counsel has provided the requested discovery. It is clear that those

Defendant Doctors who are not entitled to immunity by reason of the Virginia Tort Claims Act would not be prejudiced by this action being transferred to the appropriate district. If this case were transferred they would be in same position as if the action had been commenced in the Eastern District of Virginia in the first instance.

**II. THIS COURT, IN THE INTEREST OF JUSTICE,
SHOULD TRANSFER THIS CASE TO THE
APPROPRIATE DISTRICT FOR FURTHER
PROCEEDINGS PURSUANT TO 28 U.S.C.1361**

Section 28 U.S.C. 1631 provides as follows:

“Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a review of administrative action, is noticed or filed with such court and the court finds that there is want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed or noticed for the court to which it is transferred on the date on the date upon which it was actually filed in or noticed for the court from which it is transferred.”

Section 28 U.S.C. 1631 pertains to actions commenced in the district courts of the United States. See, 28 U.S.C. 610.

In *Sabbatino v. St. Barnabas Medical Center*, 2005 U.S. Dist. LEXIS 20647 (S.D.N.Y. Sept. 20, 2005), it is case not dissimilar to the case at bar, the Court granted the plaintiff's request that the action be transferred from New York to the District of New Jersey pursuant to 28 U.S.C. 1631. In *Sabattino* the Court found that there was no evidence that “plaintiff had filed her action in bad faith; no benefit accrued to plaintiff by so filing, nor did any detriment befall the defendants.”

Furthermore, as in *Sabbatino*, the action for medical malpractice was filed within the statute of limitations applicable to both New York and New Jersey and that dismissal at this juncture would prevent the plaintiff from re-filing in New Jersey because the action would be time-barred by that State's statute of limitations. The Court in the interest of justice transferred the action to a “court in which the action ... could have been brought at the time it was filed

or noticed.

In *Liriano v. United States*, 95 F.3d 119 (2nd. Cir. 1996), the Court cited the legislative history of Section 1631 and made the finding that:

“In determining whether a transfer is in the interest of justice, the equities of dismissing a claim when it could be transferred should be carefully weighed. *Franchi v. Manbeck*, 947 F.2d, 631, 634 (2nd Cir. 1991) (citing *Hempstead County and Nevada County Project v. EPA*, 700 F.2d 459,463 (8th Cir. 1983). Factors militating for a transfer include the finding that a new action would be barred as untimely, *see i.d.* and a finding that the original action was filed in good faith, *see Hempstead County*, 700 F.2d at 463.”

In the instant case, the Plaintiff Lion is confronted with the identical set of circumstances. As set forth in the Plaintiff Lion's affidavit the lawsuit was commenced in good faith and was filed timely whether based upon Commonwealth of Virginia or New York State law. If this case is dismissed rather than transferred to the appropriate district the plaintiff would be totally denied his day in court without the case ever being litigated on the merits. Accordingly, it is respectfully submitted that this case be transferred to the Eastern District of Virginia for further proceedings.

CONCLUSION

For all of the reasons stated above, the action against VCU Health System and Defendants Scott and Gagnon should be dismissed and the action as against the remaining Doctor Defendants Kellum, Willis, Boardman, Pozez and Hogan be transferred, in the interest of justice, pursuant to 28 U.S.C. 1631, for further proceedings.

Dated: Bronx, New York
July 27, 2007

YALKUT & ISRAEL, ESQS.

By: /s/ Arlen S. Yalkut

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Attorneys for Plaintiff David Lion

CERTIFICATION OF SERVICE

I, ARLEN S. YALKUT, an attorney duly admitted to practice in the State of New York, certifies the following to be true under the penalties of perjury: On July 30, 2007, I served the MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT as well as the AFFIRMATION AND AFFIDAVIT IN OPPOSITION TO THE DEFENDANTS' MOTION TO DISMISS THE COMPLAINT on the parties below by depositing one true copy of said papers to the addresses listed below, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

Michael T. Conway, Esq.
Leclair Ryan, a Professional Corporation
830 Third Avenue
New York, New York 10022

Linda B. Georgiadis, Esq.
Paul D. Anders, Esq.
Riverfront Plaza, East Tower
951 East Byrd Street
P.O. Box 2499
Richmond, Virginia 23218-2499

Dated: Bronx, New York
July 30, 2007


ARLEN S. YALKUT (AY1522)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID LION,

Case Number: 07 CV 3129 (SCR)

Plaintiff,

v.

VCU HEALTH SYSTEM, MCU HOSPITALS
& PHYSICIANS d/b/a VCU MEDICAL
CENTER, et al.,

Defendants.

**AFFIRMATION IN OPPOSITION TO MOTION TO DISMISS,
AFFIDAVIT IN OPPOSITION TO MOTION TO DISMISS AND
MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS COMPLAINT**

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